

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of the State Independent Alliance and)	
the Independent Telecommunications Group)	WT Docket No. 00-239
for a Declaratory Ruling That the Basic)	
Universal Service Offering Provided by)	
Western Wireless in Kansas is Subject to)	
Regulation as Local Exchange Service)	

To: Wireless Telecommunications Bureau
Commercial Wireless Division
Rules and Policy Branch

WESTERN WIRELESS CORPORATION
REPLY COMMENTS TO PETITION FOR RECONSIDERATION

Gene DeJordy
Vice President, Regulatory Affairs
WESTERN WIRELESS CORPORATION
3650 - 131st Ave. S.E., Suite 400
Bellevue, WA 98006
(425) 586-8055

Michele C. Farquhar
David L. Sieradzki
David L. Martin
HOGAN & HARTSON, L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Mark Rubin
Director, Federal Government Affairs
WESTERN WIRELESS CORPORATION
401 9th Street, N.W., Suite 550
Washington, D.C. 20004
(202) 654-5903

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Western Wireless Corporation (“Western Wireless”), by counsel, hereby
files these Reply Comments in opposition to the Petition for Reconsideration and
Clarification (“Petition”) in the above referenced docket, filed September 3, 2002 by the
State Independent Alliance and the Independent Telecommunications Group
 (“Petitioners”). 1/

1/ See “Wireless Telecommunications Bureau Seeks Comment on Petition for
Reconsideration and Clarification of Commission Order Regarding Western Wireless’ Basic
Universal Service Offering in Kansas,” *Public Notice*, DA 02-2266 (rel. Sept. 16, 2002). In the
Commission’s August 2, 2002 *Memorandum Opinion and Order* in this proceeding, the
Commission rejected the Petitioners’ original petition for declaratory ruling that requested the
Commission to clarify that Western Wireless’ Basic Universal Service (“BUS”) offering is a not
a Commercial Mobile Radio Service (“CMRS”). See *Petition of the State Independent Alliance
and the Independent Telecommunications Group for a Declaratory Ruling that the Basic
Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as
Local Exchange Service*, 17 FCC Rcd 14802 (2002) (“Order”).

INTRODUCTION AND SUMMARY

None of the commenters supporting the Petition has presented any new argument to suggest that the Commission erred in finding Western Wireless' basic universal service ("BUS") offering constitutes a mobile service and should be accorded CMRS regulatory status. ^{2/} Turning a blind eye to federal law, the Nebraska PSC and the Rural ILECs submit the unfounded argument that states are not preempted from imposing equal access requirements on CMRS carriers for universal service eligibility purposes. In fact, several sections of the Communications Act of 1934, as amended, (the "Act") specifically preclude the imposition of such requirements, and the court cases relied upon by some of the commenters do not support a contrary conclusion.

I. THE COMMISSION CORRECTLY DETERMINED THAT BUS IS A MOBILE SERVICE, AND HAS ALREADY REJECTED THE COMMENTERS' ARGUMENTS TO THE CONTRARY.

The Rural ILECs do nothing more than parrot the previously rejected arguments of the Petitioners objecting to the Commission's reasonable interpretation of the "ordinarily does move" component of the definition of "mobile station" found in the Act. ^{3/} As Western Wireless demonstrated in its initial Opposition, the Commission correctly concluded that the Act contains no requirement that a terminal unit's size and weight be used as factors to determine whether the unit "ordinarily

^{2/} Commenters supporting the Petition include the National Telecommunications Cooperative Association ("NTCA"), the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"), Fred Williamson and Associates, Inc. ("FW&A") (collectively, "Rural ILECs"), as well as the Nebraska Public Service Commission ("Nebraska PSC"). AT&T Wireless Services ("AWS") and the Cellular Telecommunications and Internet Association ("CTIA") join Western Wireless in urging the Commission to reaffirm that its classification of the BUS offering was proper.

^{3/} See, e.g., OPASTCO Comments at 2-4; NTCA Comments at 1-3.

moves,” nor does it require the “affirmative showing” advocated by the Petitioners and their supporters, [4/](#) which the Commission reasonably determined would be infeasible to implement, as it would require continual changes in the regulatory status of wireless services as consumer usage of equipment changes. Equally unpersuasive is NTCA’s attack on the Order’s finding that Western Wireless’ BUS offering is CMRS because it is an incidental service. [5/](#) As CTIA correctly notes, the Petitioners effectively seek a general reconsideration of the Commission’s well-established precedent that incidental services should be regulated as CMRS. [6/](#) Identical, repetitious arguments by other commenters do nothing to establish a need for the Commission to revisit its prior determinations.

Two other commenters, CTIA and AWS, join with Western Wireless in urging the Commission to reaffirm its classification of the BUS offering as CMRS. The finding that the BUS terminal equipment “ordinarily does move” is solidly supported by multiple *uncontested* facts in the record, [7/](#) and by a legal interpretation that has

[4/](#) Moreover, the Petitioners and their supporters ignore the extensive “affirmative showing” of factual information that Western Wireless provided. *See* Order at ¶ 18-19. To require additional information would be unnecessarily burdensome for a carrier and potentially could compromise customers’ private information.

[5/](#) In repeating the Petitioners’ irrelevant argument that § 22.323 says nothing about the regulatory status of incidental services, NTCA ignores the fact that the Commission has made it clear that the regulatory treatment of incidental services does not depend on the rule. *See Amendment of Part 22 of the Commission’s Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service*, WT Docket No. 01-108, Report and Order, FCC 02-229 (rel. Sept. 24, 2002) at ¶ 68 (“We emphasize that our elimination of the rule in no way diminishes or otherwise alters either the right of Part 22 licensees to provide incidental services or the regulatory treatment of those services as CMRS, which we have repeatedly affirmed in prior orders.”).

[6/](#) *See* CTIA Comments at 5.

[7/](#) *See* Order at ¶¶ 18-19; CTIA Comments at 3; Western Wireless Comments at 3.

been accepted by Congress and backed by extensive FCC precedent. ^{8/} Finally, the Commission properly applied established precedent and concluded that BUS should be treated as CMRS because it is “incidental” to Western Wireless’s regular cellular service, with which it shares the same spectrum and network infrastructure. ^{9/}

II. THE ACT PRECLUDES STATES FROM IMPOSING EQUAL ACCESS ON CMRS CARRIERS AS A UNIVERSAL SERVICE ELIGIBILITY REQUIREMENT

A. States May Not Evade Section 332(c)(8)’s Proscription of CMRS Equal Access Requirements by Imposing Them As Universal Service Eligibility Requirements

The Nebraska PSC and the Rural ILECs incorrectly contend that state commissions are free to impose equal access requirements upon CMRS providers as a condition for universal service eligibility, notwithstanding Section 332(c)(8)’s unequivocal directive that CMRS carriers “shall not be required to provide equal access.” ^{10/} Nothing in Sections 214(e) and 254(f) – the provisions on which these commenters base their state authority arguments – limits the applicability of this prohibition. ^{11/}

^{8/} See CTIA Comments at 4; Western Wireless Comments at 6-9.

^{9/} As AWS notes, Commissioner Abernathy’s concurrence fully endorsed this second rationale. See AWS Comments at 7-8.

^{10/} See, e.g., Nebraska PSC Comments at 1-3; OPASTCO Comments at 8; FW&A Comments at 4.

^{11/} Under the U.S. Constitution’s Supremacy Clause, the Nebraska PSC’s reliance on a state statute as a basis for its equal access requirement does nothing to overcome the Federal statutory preemption of §332(c)(8). Moreover, the Commission should disregard the Nebraska PSC’s contention that the FCC’s decision in the Order binds only the Kansas Corporation Commission. Nebraska PSC Comments at 3-4. Although correct that the Order’s findings were specific to Western Wireless’s Kansas service offering, the Order’s conclusion regarding the inability of the KCC to impose equal access is not new law, but is an application of established precedent to the specific circumstances under consideration. Accordingly, the

The Nebraska PSC and Rural ILECs attempt to skirt the clear statutory language by arguing that requirements imposed as conditions for universal service support are not “requirements” for purposes of the Act. ^{12/} The Commission long ago rejected this view, determining that mandating equal access as a universal service eligibility condition is still an unlawful equal access “requirement” for purposes of Section 332(c)(8). ^{13/} Moreover, as AWS correctly notes, a state may not *indirectly* impose an equal access requirement on CMRS carriers that it cannot impose directly. ^{14/} In fact, Section 332(c)(8) makes it clear that equal access requirements may only be imposed on CMRS providers in narrowly circumscribed conditions, and critically, the Commission – *not the states* – is the entity authorized to do so.

Western Wireless agrees with FW&A that Section 332(c) was intended to avoid regulation “that would potentially impede CMRS entry into state markets.” ^{15/} But FW&A is wrong in concluding that equal access conditions on universal service

determination in this Order adds to and is part of the body of precedential law on this point, and is indeed relevant to analogous circumstances in other states.

^{12/} See, e.g., NTCA Comments at 5; Nebraska PSC Comments at 4.

^{13/} *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, 8819, ¶ 78 (1997) (“*Universal Service Order*”), *subsequent history omitted*. OPASTCO therefore is incorrect in its speculation that Congress intended all eligible telecommunications carriers (“ETCs”), including CMRS carriers, to provide comparable services, including equal access, because customers otherwise would experience service degradation should an ILEC relinquish its ETC designation in an area and leave the CMRS carrier as the sole provider. OPASTCO Comments at 8.

^{14/} AWS Comments at 5 (citing *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 201 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996); *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000)) See also *Frost v. Railroad Commission of the State of California*, 271 U.S. 583, 593 (1926) (state regulator could not impose as a “condition” a requirement that it was not authorized to impose directly: state may not strip party of federally-guaranteed rights “under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold”).

^{15/} FW&A Comments at 5.

support “in no way hampers” the ability of CMRS carriers to enter markets. ^{16/} To the contrary, it was reasonable for the FCC to conclude, based on the broad, pro-competitive mandates and policies of the 1996 Act, that CMRS entry into the local service market would be impeded if equal access conditions were imposed on CMRS carriers for universal service purposes. ^{17/}

B. State-Imposed CMRS Equal Access Requirements Violate Sections 253 and 254 of the Act.

Section 253(a) mandates that no state or local requirement “may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service.” ^{18/} A universal service requirement that places CMRS carriers at a competitive disadvantage would “have the effect of prohibiting” CMRS carriers from providing supported universal service. ^{19/} The limited “safe harbor” of Section 253(b) is denied to state requirements that are not competitively neutral.

^{16/} *Id.* at 6. The Commission has held that state rules or requirements that effectively preclude an entity from qualifying as an ETC or receiving universal service support amount to barriers to competitive entry. *See* Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas Universal Service Fund, *Memorandum Opinion and Order*, 15 FCC Rcd 16227, 16231, ¶ 8 (2000) (“*Kansas USF Declaratory Ruling*”); Western Wireless Corp. Petition for Preemption of an Order of the South Dakota Public Utilities Commission, *Declaratory Ruling*, 15 FCC Rcd 15168, 15177, ¶ 23 (2000) (“*South Dakota ETC Declaratory Ruling*”).

^{17/} *Universal Service Order* at ¶ 79 (“supporting equal access would undercut local competition and reduce consumer choice and, thus, would undermine one of Congress’s overriding goals in adopting the 1996 Act”).

^{18/} 47 U.S.C. § 253(a).

^{19/} *See Kansas USF Declaratory Ruling* at ¶ 8; *South Dakota ETC Declaratory Ruling* at ¶ 23.

The Commission has correctly concluded that to impose equal access requirements upon CMRS carriers would not be competitively neutral, because equal access requirements would be uniquely burdensome to CMRS carriers. Unlike ILECs, most of which have been providing equal access for nearly two decades, most CMRS carriers have no systems or procedures in place for providing such access, as standard industry practice is for the CMRS provider to provide both local and long distance services to their customers. Indeed, driven by consumer demand, many carrier plans do not distinguish between local and long distance calling. ^{20/} Such arrangements permit carriers to bundle services in cost effective ways, benefiting consumers and helping to make CMRS a viable competitor to local landline service. There is no indication that consumers are displeased by the lack of long distance choices available for their wireless services. ^{21/}

Contrary to OPASTCO's unsupported conclusion, ^{22/} the Commission long ago determined that an equal access requirement would violate competitive neutrality, and that symmetrical requirements imposed on incumbents and new market entrants alike do not equate to "competitively neutral." ^{23/} Imposing an equal access requirement for universal service support could eliminate the only meaningful competition – wireless – in rural ILEC service areas.

^{20/} See AWS Comments at 4.

^{21/} See *id.* at 4, n.12 (citing FCC and trade press sources attesting to the popularity of on-network long distance calling plans).

^{22/} OPASTCO Comments at 7.

^{23/} *Universal Service Order* at ¶ 79.

Equal access requirements also fail to qualify for the Section 253(b) safe harbor provision for requirements that are “necessary to preserve and advance universal service.” Section 254(c) commits to the exclusive jurisdiction of the Commission (in consultation with the Federal-State Joint Board on Universal Service) the authority to define what constitutes universal service. ^{24/} Because the Commission has determined that equal access is not part of the definition of universal service, ^{25/} such requirements accordingly would not comply with this § 253(b) restriction. ^{26/} Moreover, because an equal access requirement would effectively preclude CMRS carriers from qualifying as ETCs, which in turn would preclude consumers in rural areas from obtaining competitive choices among universal service providers, an equal access requirement is actually *inimical* to the preservation and advancement of universal service.

Finally, Section 254(f) authorizes states to adopt their own universal service programs and rules, but requires that such programs be “not inconsistent with the Commission’s rules.” Much like the prohibition on rate and entry regulation, to require equal access on CMRS providers as part of a state universal service program flies directly in the face of federal law and FCC rules to the contrary, and therefore such a requirement would violate Section 254(f). As established above, the

^{24/} The Joint Board split, and did not recommend any change to the definition in this regard.

^{25/} *Universal Service Order* at ¶ 78.

^{26/} See also *Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas Universal Service Fund, Memorandum Opinion and Order*, 15 FCC Rcd 16227, 16231-33, ¶¶ 9-11 (2000) (holding that, to be lawful under § 253, a state program must meet all three statutory requirements: be competitively neutral, be consistent with § 254, and be “necessary to preserve and advance” universal service).

Commission unambiguously ruled in the *Universal Service Order* that equal access requirements on CMRS carriers for universal service purposes are not permitted.

C. The Fifth Circuit and Utah Supreme Court Cases Cited by the Nebraska PSC and Rural ILECs Do Not Support Their Arguments

The Nebraska PSC and Rural ILECs ineffectively attempt to rely on the Fifth Circuit’s 1999 *Texas OPUC I* decision to support their ability to disregard parts of the Act. ^{27/} *Texas OPUC I*, however, is inapposite. The court only held that, contrary to the FCC’s conclusion the *Universal Service Order*, Section 214(e)(2) on its own does not establish a blanket prohibition on additional state eligibility requirements. ^{28/} However, the court made it clear that Section 214(e)(2) does not address “*how much discretion* a state commission retains to impose eligibility requirements.” ^{29/} Moreover, the court did not consider the relevant limitations imposed by Sections 253, 254(f), or 332(c)(8) in reaching its holding on this point; and the decision is further distinguished by the court’s partial reliance on Section 2(b), which by its own terms does not apply to Section 332. ^{30/}

^{27/} *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 417-18 (5th Cir. 1999) (“*Texas OPUC I*”). See Western Wireless Comments at 18 n.45.

^{28/} *Texas OPUC I*, 183 F.3d at 418.

^{29/} *Id.* (emphasis added). The court specifically noted that “if a state commission imposed such onerous eligibility requirements that no otherwise eligible carrier could receive designation, that state commission would probably run afoul” of the Act. *Id.*, n.31. The court also stressed that it would not, and could not, interpret any portion of the Act to overcome the preemptive effect of Section 332(c) – and on that basis found that states could impose universal service assessments because taxing a CMRS provider did not constitute setting a retail rate, and thus did not implicate Section 332. *Texas OPUC I*, 183 F.3d at 431. The court based its reasoning on “Congress’s instruction that § 254 be construed in ways that do not conflict with other federal laws,” and in particular Section 332(c). *Texas OPUC I*, 183 F.3d at 431, 433 (citing Section 601(c) of the Act, reprinted in 47 U.S.C. § 152 (Addendum A-1)).

^{30/} *Id.* n. 32; 47 U.S.C. §§ 253, 254(f), 332(c)(8), 152(b).

The Commission should also disregard the Utah Supreme Court decision cited by the Nebraska PSC and the Rural ILECs. [31/](#) First, the Commission is not bound by a state court interpretation of the Communications Act, which Congress empowered the FCC to interpret in the first instance. [32/](#) Moreover, that decision concerned an interpretation of Section 332(c)(3), not Section 332(c)(8) which is at issue here, and failed to even consider the impact of Sections 253 and 254(f) (discussed above). Most fundamentally, the decision is simply wrong: as discussed above, a state may not apply an unlawful requirement to CMRS carriers, whether it imposes such a requirement directly or as a condition for universal service eligibility. [33/](#)

[31/](#) *WWC Holding Co., Inc. v. Public Service Commission of Utah*, 44 P.3d 714, 722-23, ¶¶ 27-30 (Utah 2002) (“*Utah PSC*”). Notably, the Washington Utilities and Transportation Commission recently rejected a similar argument advanced by rural ILECs in that state. *See RCC Minnesota, Inc., Order Granting Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. UT-023033 (Aug. 14, 2002) at ¶¶ 53-56.

[32/](#) *See, e.g., Applications of Northwest Broadcasting, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 3289, n. 13 (1997) (“We are not bound by the orders of state courts, however, and will not recognize every order in every circumstance”) (*citing Kirk Merkley, Receiver*, 94 FCC 2d 829 (1983)).

[33/](#) *See supra* note 14 and sources cited therein.

CONCLUSION

For the foregoing reasons and for the reasons stated in Western Wireless' initial Opposition, the Commission should again reject the arguments raised by the Petitioners, the Rural ILECs and the Nebraska PSC.

Respectfully submitted,

**WESTERN WIRELESS
CORPORATION**

Gene DeJordy
Vice President, Regulatory Affairs
WESTERN WIRELESS CORPORATION
3650 - 131st Ave. S.E., Suite 400
Bellevue, WA 98006
(425) 586-8055

Mark Rubin
Director, Federal Government Affairs
WESTERN WIRELESS CORPORATION
401 9th Street, N.W., Suite 550
Washington, D.C. 20004
(202) 654-5903

By: /s/ David L. Sieradzki
Michele C. Farquhar
David L. Sieradzki
David L. Martin
HOGAN & HARTSON, L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

October 31, 2002

CERTIFICATE OF SERVICE

I, David L. Martin, hereby certify that on this 31st day of October, 2002, the foregoing Opposition of Western Wireless was served on the following by first class mail or by electronic delivery.

/s/ David L. Martin
David L. Martin

Thomas Sugrue, Chief*
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jim Schlichting, Deputy Chief*
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

David Furth, Associate Chief*
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

William Kunze, Chief*
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jeff Steinberg, Deputy Chief*
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Rose Crellin*
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Eric Einhorn, Acting Chief*
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Stephen G. Kraskin*
David Cosson
John B. Adams
Kraskin, Lesse & Cosson, LLP
2120 L Street, N.W., Suite 520
Washington, D.C. 20037

Mark E. Caplinger
James M. Caplinger
James M. Caplinger, Chartered
823 W. Tenth
Topeka, KS 66612

Thomas E. Gleason, Jr.
Gleason & Doty, Chartered
P.O. Box 6
Lawrence, KS 66044

Qualex International*

Room CY-B-402

445 12th St, SW

Washington, DC 20036

Milton Price*

Wireless Telecommunications Bureau

Commercial Wireless Division

Federal Communications Commission

445 12th Street, S.W.

Washington, DC 20554

* Denotes electronic delivery.